IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 24, 2006 at Knoxville

STATE OF TENNESSEE v. ANTONIO D. RICHARDSON

Appeal from the Criminal Court for Davidson County
No. 2003-B-1458 Steve Dozier, Judge

No. M2005-01161-CCA-R3-CD - Filed September 7, 2006

ORDER ON PETITION FOR REHEARING

I. Introduction.

The state has petitioned the court for a rehearing. See Tenn. R. App. P. 39. This court's opinion, filed May 4, 2006, reversed the defendant's two effective convictions of especially aggravated kidnapping and dismissed those underlying charges; this court affirmed the convictions of aggravated assault, reckless endangerment, and burglary. *See State v. Antonio D. Richardson*, No. M2005-01161-CCA-R3-CD (Tenn. Crim. App., Nashville, May 4, 2006). The defendant had pleaded guilty to one charge of attempt to commit especially aggravated robbery with a deadly weapon and resulting in serious bodily injury. The especially aggravated kidnapping reversals were prompted by the doctrine of *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991), and its progeny. In *Anthony*, our supreme court held that principles of due process of law are offended when a defendant is convicted both of a kidnapping offense and of an associated felony and the confinement or movement of a victim was essentially incidental to the commission of the associated felony. *See id.* at 306. In the present case, the associated felony was the attempt to commit especially aggravated robbery, with which the state charged the defendant and to which charge the defendant pleaded guilty.

II. The Petition.

The state's petition to rehear the case ably voices various complaints about the court's application of the *Anthony* due process doctrine to the case at hand. We summarize the state's claims, beginning with its assertion that the confinement or movement of the two victims was not incidental to the commission of the attempted especially aggravated robbery. Central to the state's claim is the proposition that the victims' physical injuries suggest that their confinements or

movements were not incidental to the attempted robbery. The state argues that both *Anthony* and *State v. Dixon*, 957 S.W.2d 532 (Tenn. 1997), declare that *harm* suffered by a victim is relevant to the question "whether a victim's movement and confinement were essentially incidental to the robbery" and that "a victim's *injuries* are clearly relevant to this Court's determination of whether the victim's movement and confinement were incidental to the attempted robbery." (Emphasis added.)

Next, the petition takes issue with this court's dicta that the confinement or removal of Ms. Howell and Ms. Lucas did not prevent the victims from summoning help or lessen the defendant's risk of detection and that Ms. Howell's confinement did not create a significant danger or increase the risk of harm to her. Of note, the state advocates that Ms. Lucas' confinement inside Calhoun's office was not incidental to the attempted robbery and, as such, "prevented her from summoning help."

III. Standard of, and Limitation upon, Appellate Review.

"The issue of whether a separate kidnapping conviction violates [principles of] due process is purely a question of law." *State v. Fuller*, 172 S.W.3d 533, 536 (Tenn. 2005) (citing *State v. Cozart*, 54 S.W.3d 242, 247 (Tenn. 2001)). We review questions of law de novo with no presumption of correctness afforded to the lower court's conclusions. *Id.*; *see Ki v. State*, 78 S.W.3d 876, 879 (Tenn. 2002).

Notwithstanding the breadth of that standard of review, we, as an intermediate appellate court, are bound by the decisions of the Tennessee Supreme Court as to state and federal constitutional questions. *State v. Pendergrass*, 13 S.W.3d 389, 397 (Tenn. Crim. App. 1999); *Thompson v. State*, 958 S.W.2d 156, 173 (Tenn. Crim. App. 1997). Thus, although we must review the underlying circumstances and issues in this case de novo, judicial restraint and rules of procedure require an intermediate appellate court to toe the established line, even if we would have preferred a different result. *See* Tenn. Sup. Ct. R. 4(H)(2) ("Opinions reported in the official reporter, however, shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.").

Serious and valid questions, although beyond our reach, abound in this case. Should a kidnapping conviction be allowed in tandem with a conviction of the associated felony when the restraint becomes extensively protracted? Perhaps, but as we shall explain, the supreme court has focused upon the purpose of the removal or confinement and not the duration. Should *Anthony* be inapplicable whenever the victim is seriously injured? Perhaps, but as we shall also explain, such is not presently the law. Should *Anthony* be inapplicable when the associated felony is only an attempt? Perhaps again, but our supreme court has declined to adopt such a rule.

Finally, should *Anthony* due process violations invariably result in the dismissal of the kidnapping conviction as opposed to the merger of convictions, with the most serious conviction surviving and controlling the sentencing outcome? Perhaps not, and in our written opinion, we

pointed out the glaringly disparate results from dismissal versus merger. Even so, on this point we can only raise the level of discussion, as we are not at liberty to vary the interpretation of *Anthony* set forth in the reported decision, *State v. Taylor*, 63 S.W.3d 400, 410 (Tenn. Crim. App. 2001). *See* Tenn. Sup. Ct. R. 4(H)(2).

IV. Review.

The contours of due process seldom are sharply defined. This case is no exception.

Fifteen years ago, in *State v. Anthony*, 817 S.W.2d 299 (Tenn. 1991), the supreme court ruled that a separate kidnapping conviction violates principles of due process when "the confinement, movement, or detention is essentially incidental to the accompanying felony" and not "significant enough in and of itself to warrant independent prosecution." *Id.* at 305. This rule has since been amplified, but it remains viable, as the supreme court explained in *State v. Fuller*, 172 S.W.3d 533 (Tenn. 2005).

> [In *State v. Dixon*, 957 S.W.2d 532 (Tenn. 1997), w]e crafted a two-part test for identifying *Anthony* due process violations. First, a court must determine whether the movement or confinement used was beyond that necessary to commit the accompanying felony. The focus is upon the "purpose of the removal or confinement and not the distance or duration." If the first question is answered affirmatively, then the next inquiry is "whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm."
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> [The defendant] argues that *Dixon* altered the rule adopted in *Anthony* rather than clarifying it and that . . . *Dixon* improperly changed the question from whether the restraint was "essentially incidental" to the robbery, as required in *Anthony*, to whether the restraint was "necessary" to commit the robbery. The first question in the *Dixon* analysis -- whether the movement or confinement used was beyond that necessary to commit the accompanying felony -- *does not replace* the "essentially incidental" test. The first question is a threshold determination. An affirmative answer does not end the inquiry. The second question -- whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm -- establishes the various methods of resolving the issue. The analysis set forth in *Dixon* therefore provides the structure necessary for applying the principles announced in *Anthony*.

Fuller, 172 S.W.3d at 536-37 (citations omitted) (emphasis added).

In several parts of its petition, the state cites to the decision in *State v. Johnny Maxwell*, No. W2004-00466-CCA-R3-CD (Tenn. Crim. App., Jackson, May 20, 2005). *Johnny Maxwell* was decided approximately four months prior to *Fuller* and indicated that *Dixon* restricted *Anthony*. *Id.*, slip op. at 6-7 (speculating that defendant's detention of the victim in *State v. Rolland*, 861 S.W.2d 840 (Tenn. Crim. App. 1992), would not survive the *Dixon* test). In our view, however, *Fuller* clarifies that the tenets of *Anthony* were not abandoned or restricted by *Dixon*.

Within this legal framework, we look first at the state's arguments about the "necessary movement or confinement" prong of the due process analysis. Regarding this threshold determination, "[t]he focus is upon the 'purpose of the removal or confinement and not the distance or duration.'" *Fulle*r, 172 S.W.3d at 536. Furthermore, the determination "is highly dependent on the facts in each case." *Anthony*, 817 S.W.2d at 306.

A. Whether the victims' movements and confinements were beyond that necessary to commit attempted especially aggravated robbery

(1) Movement and Confinement of Ms. Howell.

In its petition, the state argues that the plight of Ms. Howell is "easily distinguishable" from that of the restaurant managers in *Anthony* and *State v. Sanders*, 842 S.W.2d 257 (Tenn. Crim. App. 1992). In support, the state claims that the defendant learned, as he was forcing Ms. Howell to accompany him upstairs, that Ms. Lucas was already in the office; therefore, according to the state, Ms. Howell's assistance was not needed to open the safe such that the subsequent movement and confinement were unnecessary. Citing page 198, Volume III, of the trial transcript, the state writes that the defendant "marched her to a caged area in the back corner of the second-floor stockroom, where he pistol-whipped her."

We begin by pointing out that the reference to a "caged area" may imply that Ms. Howell was confined in a cage. However, Ms. Howell testified at trial,

> And he took me to the back scrubs cage, which is a cage that is covered by chicken wire, where we keep all of our dishes and things like that, and let go of me.
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> And I was going to, I guess - you know - natural reaction to turn around; and I was hit with an object in my head. I'm assuming it was a gun, 'cause that's what was next to my head anyways.
>
> And I fell, and I just laid there. And I saw - I could see on the bottom of the floor all the feet go to the office. . . .

In addition, the diagram of the second floor in evidence depicts Ms. Howell lying in the corner of the open storage room that had been partitioned off with chicken wire. Ms. Howell apparently lay partly in the wired-off area and partly in the open room, which itself is not a large space. The door to the fan room was set in a wall opposite the "cage." The storage room was accessed by an open passageway from the stair landing, and the office was also accessed from the stair landing.

Mindful that the focus of the threshold due process determination is upon the "purpose of the removal or confinement," this court's opinion noted that Ms. Howell "was apparently targeted because, as a manager, she had the means to enter the restaurant's till." Indeed, after Ms. Lucas' attempts to open the safe were unsuccessful, the defendant's companion sought out Ms. Howell for assistance. She testified that "someone came back and asked me what the safe combination was, and I told it to him. It was a different voice, though, is the only thing. And – and then he left." From the evidence, it is reasonable that the purpose of confining Ms. Howell was to immobilize a witness to a crime in progress. Moreover, Ms. Howell was not merely a restaurant customer; she was a business employee with an employment duty to summon law enforcement officers. In addition, it is reasonable that the defendant needed Ms. Howell to be available if additional assistance in opening the safe was required. Accordingly, Ms. Howell's confinement was necessary to commit the particular felony that was in progress.[1]

(2) Movement and Confinement of Ms. Lucas.

Relative to the movement and confinement of Ms. Lucas, the state partitions its argument between Ms. Lucas' confinement in the office and her removal and confinement in the fan room. The parties' closing arguments at trial were not part of the appellate record; however, the record showed that when the parties were discussing how *Anthony* might impact the case, the state focused exclusively on Ms. Lucas' removal from the office into the unlit and windowless fan room.

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[1] For purposes of the *Anthony* analysis, the associated felony in the present case is the defendant's attempt to commit especially aggravated robbery. In our written opinion, we purposefully evaluated whether a victim's removal or confinement "exceeded the bounds necessary to commit *robbery*." *Antonio D. Richardson*, slip op. at 7 (emphasis added). Absent a prompting by the parties' briefs, we examined whether the principles of *Anthony* would apply when the associated felony conviction was merely of an attempt. *See id*., slip op. at 7-8. We cited *State v. Taylor*, 63 S.W.3d 400, 410 (Tenn. Crim. App. 2001), in which this court applied the principles of *Anthony* despite that the associated felony conviction was of attempted aggravated rape. *See Antonio D. Richardson*, slip op. at 8. Although we are bound to recognize *Taylor* as controlling authority, *see* Tenn. Sup. Ct. R. 4(H)(2), we have looked anew at the issue because it was not squarely addressed in *Taylor*. Ultimately, our conclusion must remain, however, upon reviewing *Dixon* on this issue. In *Dixon*, the associated felonies were aggravated assault and attempted sexual battery. *Dixon*, 957 S.W.2d at 532. In analyzing the necessity of the victim's removal or confinement, the *Dixon* court said, "We must decide whether the movement or confinement was beyond that necessary to *consummate* the act of attempted sexual battery." *Id*. at 535 (emphasis added). The court concluded that Dixon's "dragging the victim . . . after the initial assault was beyond that necessary *to complete* the attempted sexual battery." *Id*. (emphasis added). Thus, the supreme court has said that the purpose of the offender, and not his ultimate success in fulfilling his purpose, is controlling.

[BY THE STATE:]

> [Ms. Lucas] was taken from the office area, where there was a working phone, and removed - while it may not be down the hall, the case law is plenty, it's not the distance that matters - but was removed from one area to another room, that did not have access to a phone, that did not have access to the immediate stairways, did not have access to a window; that was out of the way, where she would not readily be found by people coming searching for her. She would've been readily found, if they searched for her in the office area.

The trial court likewise focused on the removal from the office to the fan room. This court did not overlook or discount the duration or the circumstances of the confinement in the office; rather, those particular aspects did not directly bear on the *Anthony* issue for Ms. Lucas as framed by the parties at trial and as ruled upon by the trial court.

That said, the state now maintains that the defendant's "unlawful confinement of Ms. Lucas in the office through the use of force (namely, the twenty-to-thirty-minute-long beating), constituted false imprisonment beyond that necessary to consummate the attempted robbery." We agree that the defendant's confinement of Ms. Lucas constituted false imprisonment and a kidnapping, and we noted in the opinion that the "defendant struck Ms. Lucas in the head a number of times and also struck her hand, apparently using the gun as a club." The defendant's mistreatment of Ms. Lucas supported the "especially aggravated" form of robbery and the "especially aggravated" form of kidnapping. Thus, the evidence supports the especially aggravated kidnapping conviction; the due process concern voiced in *Anthony*, however, is not an evidence sufficiency issue.

The money that the defendant sought was secured in a locked, combination safe. Keeping an employee, such as Ms. Lucas, who knew how to access the safe in the office is a elementary example of a false imprisonment or kidnapping that is not beyond that necessary to consummate the accompanying felony. The purpose of the confinement is self-evident, and the confinement's duration is not per se pertinent to the threshold *Anthony* analysis, even if it should be. *See Fuller*, 172 S.W.3d at 536 ("The focus is upon the 'purpose of the removal or confinement and not the distance or duration.'" (quoting *Dixon*, 957 S.W.2d at 535)).

Turning next to the bodily injury inflicted upon Ms. Lucas, Ms. Lucas was brutalized many times. In her trial testimony, Ms. Lucas related that after she opened the office door, which was locked from the inside, the defendant moved toward her, put his hand over her mouth, and told her to get on her knees. She complied, and the defendant then pushed her to the floor and unsuccessfully attempted to duct-tape her mouth. As the defendant started to duct-tape her hands, he inquired about the location of the money. When she told him that the money had already been deposited in the safe, he made her kneel down in front of the safe and ordered her to open the safe. The defendant did not strike Ms. Lucas until after she had tried "a coupla times" to open the safe.

She tried again to open the safe, and the defendant hit her again, and at one point, the defendant struck and almost severed her finger. Ms. Lucas testified that after injuring her hand, the defendant "just kept yelling at [her] to open the safe," and he struck her "a coupla more times." At some point, Ms. Lucas recalled that the defendant asked for the safe combination, and she provided it.

Ms. Lucas also recalled that a second male figure came to the office door at some point and said, "Come on, let's go." The defendant said, "This b**** is playing games with us. Give it to me," and Ms. Lucas recalled feeling a metal object at her temple, and a gun was displayed to her. She again tried to open the safe, but when she could not, the defendant straddled her, hit her over the head, and dragged her to the fan room.

Although her testimony is unclear about the time frame, Ms. Lucas remembered the second man "running, or possibly running, back in the room to get with the safe combination." She testified, "I don't – I don't know if I am remembering it correctly – but I had a feeling that somebody may've walked through once or twice towards the safe and then back out again."

The record evinces that the defendant struck Ms. Lucas a number of times to extract her cooperation to open the safe. As such, the confinement of Ms. Lucas in the office with the attendant brutality was not beyond that necessary to commit the attempted robbery in progress.[2]

The state contends that *Anthony* and *Dixon* declare that a victim's injuries are relevant to the question whether a victim's movement and confinement exceeded what was necessary to commit the associated felony. We note, however, that *Dixon* was not referring to the threshold inquiry. Rather, the court was discussing the second prong of *Anthony* and was distinguishing, but not overruling, *State v. Coleman*, 865 S.W.2d 455 (Tenn. 1993).

> We find that the defendant's act of dragging the victim approximately thirty to forty feet after the initial assault was beyond that necessary to complete the attempted sexual battery. . . . Accordingly, we now focus on the second inquiry.
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> The evidence introduced at trial indicates that . . . [the defendant] forcefully dragged the victim to the secluded location to avoid detection. The investigating officer testified that the entire

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[2] In this case, the "associated felony" was the charge of attempted especially aggravated robbery accomplished with a deadly weapon and resulting in serious bodily injury. The defendant pleaded guilty to this charge before going to trial on the remaining charges, and the trial court ultimately accepted the guilty plea. The charges tried before the jury included two counts of especially aggravated kidnapping accomplished with a deadly weapon (Ms. Howell and Ms. Lucas) and resulting in serious bodily injury (Ms. Lucas). *See* Tenn. Code Ann. §§ 39-13-305, -403 (2003). However, as we have explained, *see supra* note 1, we are constrained to analyze the defendant's offensive purpose and whether the victim's movement or confinement was beyond that necessary "to complete" his intended, attempted offense, *see Dixon*, 957 S.W.2d at 535.

> incident would have been visible from the street had [the defendant] not removed the victim from the location where he initially assaulted her. . . . Accordingly, we find that [the defendant's] movement of the victim lessened the risk of detection and substantially increased the risk of harm to the victim.
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> The circumstances of the present case are distinguishable from both *Anthony* and *Coleman*. . . . In the case now before us, we have testimony that the movement lessened the risk of detection. The lessened risk of detection increased the risk of harm to the victim. Moreover, the victim sustained serious bodily injuries.

Dixon, 957 S.W.2d at 535-36.

The connection between injury and the second, effect-of-the-movement prong of *Anthony* also appears in *Fuller*. In addressing the first or threshold question in the *Anthony/Dixon* analysis, the supreme court agreed with the lower court that "the confinement of Mrs. Woods was beyond that necessary to commit the robbery." *Fuller*, 172 S.W.3d at 537. As support, the supreme court stated that "[t]he proof showed that [the co-defendants] already had taken the seventy dollars from the dresser before binding Mrs. Wood with duct tape." *Id*. The court deduced that the intruders' "primary goal was to steal money and drugs from Little Jason," that the "binding of Mrs. Woods was intended to confine her while [the intruders] forced Mr. Woods to show them the correct townhouse," and that the intruders "did not bind Mrs. Woods for the sole purpose of facilitating the robbery or their escape." *Id*. Having decided that the confinement of Mrs. Woods was beyond that necessary to commit the robbery, the court turned to the second inquiry.

> . . . Mrs. Woods was bound with the belief that she would remain confined until [the intruders] returned. Her confinement was intended to further the objective of lessening the risk of detection while [the men] located the correct townhouse. . . . When the men returned, [one man] threatened to kill her and placed the barrel of a rifle in her mouth. This additional assault demonstrates the separate act of confinement after the robbery created a significant danger to Mrs. Woods and undoubtedly increased her risk of harm.

Id. at 537-38.

In *Anthony*, the court's reference to harm related to what it described as a "closer case" involving the three employees who were forcibly detained behind the restaurant while the actual robbery was going on inside. The court reasoned,

> These three employees were held only briefly; they were not harmed in any way; nor were they forced to move to a different location

> where additional harm might have befallen them. They were not, in short, subjected to any "*substantially increased risk of harm over and above that necessarily present in the crime of robbery itself.*"

817 S.W.2d at 307 (emphasis added). The emphasized language "substantially increased risk of harm over and above that necessarily present in the crime of robbery itself" was lifted from the opinion in *State v. Rollins*, 605 S.W.2d 828, 830-31 (Tenn. Crim. App. 1980),[3] and it is the language embedded in *Dixon* and *Fuller* as part of the second prong of *Anthony*.

This court's statement that "the due process problem with kidnapping as a part of a tandem of convictions occurs at the most fundamental level and exists regardless of the presence of factors such as bodily injury" derives from the supreme court cases under discussion. In *Anthony*, the due process problem existed even though the three employees detained outside the restaurant were not harmed. In *Dixon*, the due process issue arose because the defendant dragged the victim approximately 30 to 40 feet after the initial assault and not because the victim was assaulted before and after being removed to the vacant lot; in other words, had the defendant in *Dixon* not removed the victim from the illuminated sidewalk, his aggravated kidnapping conviction would have violated principles of due process. In *Fuller*, Mrs. Woods's confinement with duct-tape occurred after the men had taken the money from her bedroom dresser; her confinement, not the later assault, raised the due process issue. For the same reason, the injuries to Ms. Lucas do not *create* the due process concerns.

Our opinion should not be interpreted, as the state suggests, as holding that a victim's injuries do not inform the *Anthony* analysis at all. Indeed, in dicta this court stated that should analysis of the second prong of *Anthony* be necessary, the evidence would support a conclusion that the removal and confinement of Ms. Lucas in the fan room created a significant danger or risk of harm to her.

Turning to Ms. Lucas' removal and confinement in the fan room as a basis for tandem convictions, the state asserts in its petition that the evidence at trial contradicts the inference that Ms. Lucas was removed to the fan room because of the size constraint of the office. The state identifies the purpose of the removal "to shut [Ms. Lucas] up." The state also maintains "nowhere does the record reflect that the defendant or his accomplice returned to the office to open the safe after moving and confining Ms. Lucas in the fan room."

Ms. Lucas testified, however, that "it's a small office," that "[i]t is not a big place at all," and that "[t]wo manager[s] max" could work in the office, and "after that it's – there's too many

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[3] While sitting on the Tennessee Court of Criminal Appeals, Judge Daughtrey authored the opinion in *Rollins*. Later, as a Justice on the Tennessee Supreme Court, she authored the opinion in *Anthony*.

people in there."[4] This testimony supports the court's inference that the defendant moved Ms. Lucas to afford space in the office to work on the safe. We disagree that Ms. Lucas' testimony contradicts this court's inference. The office was "small" measured by any standard. Furthermore, the state's claim that Ms. Lucas was removed "to shut her up"[5] dovetails into the court's inference. Ms. Howell testified about hearing "a lotta yelling and crying" coming from the office and that the yelling and crying continued after Ms. Howell provided the safe combination to the second assailant. With Ms. Lucas under these circumstances, the robbers' removing her from the room "to shut her up" is a legitimate inference, based upon testimony in evidence.

These inferences are not offset by Ms. Howell's testimony that the alarm on the back door was triggered after she saw the defendant put Ms. Lucas in the fan closet. The state surmises that moving Ms. Lucas was intended to separate her from the telephone and delay her ability to summon help. It is undisputed that something triggered the back door alarm. Tim Ayers, a Calhoun's employee who was on the premises, testified that he and two other employees, after becoming aware of the robbery, retreated to the second-floor dining room balcony. They discussed escaping from the restaurant to notify the police. After assuring Mr. Ayers that they would return, his companions left the restaurant, sounding the alarm system when they opened the door to the outside. A short time later, the police arrived, and "a few minutes later," Mr. Ayers, still on the second floor landing, saw a "robber" run from the kitchen into the dining room area, look outside, and then run back through the dining room and into the kitchen. After waiting "a few more minutes," Mr. Ayers exited the same door that the two other employees had used. The defendant's statements to Lieutenant Hewitt at the scene regarding how he exited the restaurant showed that he was the "robber" who Mr. Ayers observed.

In addition, Ms. Lucas testified that when she left the fan room to assist Ms. Howell to her feet, the women "heard a sound," prompting Ms. Lucas to return to the fan room. Ms. Lucas recalled that after a few seconds, the sound "passed," and she exited the fan room once more. Ms. Howell confirmed that she and Ms. Lucas thought they heard someone, and Ms. Howell warned Ms. Lucas, "We need to get back, so they don't think we're trying to run around." After some time passed, Ms. Lucas and Ms. Howell went into the office, locked the door, and called the police.

Based on the testimony, the court inferred that the defendant, who the police discovered was still on the premises and hiding behind a shrub near an exterior restaurant wall, did not exit at the time the alarm sounded; rather, the restaurant employees triggered the alarm after Ms. Lucas was removed to the fan room but prior to the defendant's departure. Ms. Howell's and Ms. Lucas' testimony about hearing someone after the door alarm sounded clearly suggested that one or

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[4] Ms. Lucas also said, "It's a small office; but I don't think it's as small as you're thinking or I led you to believe before."

[5] At trial, one of the investigating police officers testified that when he asked the defendant at the scene about blood on the floor in the maintenance/storage area, the defendant "indicated that – that Juan had taken one of the – the women into that storage area to shut her up."

more of the assailants had not departed, and because of the tight configuration of space, if the assailants were not in the fan room or stockroom, they logically were in the office. Mr. Ayers then saw a "robber" exit through the kitchen area, after the police arrived, and he testified that the kitchen is in a different direction from the door that triggered the alarm. Therefore, it is reasonable to infer that the defendant or the defendant and his accomplice remained in the office, and using the safe combinations provided by both women, attempted to open the safe after Ms. Lucas was placed in the fan room "to shut her up."

In passing, we observe that had the defendant merely wished to prevent Ms. Lucas from using the telephone while he made his escape, he could have more easily disabled the telephone in the office and left Ms. Lucas in the office.

The focus, we are mindful, remains upon the purpose of the removal or confinement and not the distance or duration. Seldom will such purpose be revealed by direct evidence, especially when the accused opts not to testify. Just as in the homicide context, all of the circumstances surrounding the commission of the offense are examined to arrive at reasonable deductions and inferences regarding the defendant's intent. *See State v. Inlow*, 52 S.W.3d 101, 105 (Tenn. Crim. App. 2000). As we noted at the outset, our review of the due process question is de novo with no presumption of correctness afforded to the lower court's conclusions, and in the course of our review in this case, we arrived at certain deductions and inferences that we regard as reasonable based on the cumulative testimony and circumstances. Because the application of due process principles is supported by circumstances indicating that the robbery attempt continued after Ms. Lucas was placed in the fan room, we need not address whether her removal or confinement was incidental to an escape attempt.

In concluding our review of the *Anthony*/*Dixon* "beyond-that-necessary prong," we point out that cases, such as *Dixon*, wherein the object of the associated felony is money or chattels held on the victim's person – or, in fact, *is* the victim's person – a short time frame usually attends the commission of the associated felony once the victim is encountered. *Dixon* is a prime example of that type of case. Because defendant Dixon encountered his victim on the sidewalk and could have committed the aggravated assault and attempted sexual battery at that location, movement of the victim away from the sidewalk exceeded what was necessary to commit the related felonies. Such cases are not always specifically helpful in analyzing fact patterns, as in the present case, wherein the associated felony, such as emptying a safe, cannot be accomplished when or where the first victim is initially encountered. The offender's ensuing efforts in those cases necessarily and by definition require some confinement and/or movement of a victim; moreover, the time frame of commission is sometimes, as in the present case, prolonged because the offender is unable to expedite or complete the offense. Yet, as we have mentioned above, the purpose – and not the duration – of the kidnapping has been the touchstone for the *Anthony* analysis.

Finally, it occurs to us that the state's complaint that the victims' injuries mandate separate convictions of especially aggravated kidnapping perhaps was better expressed in its argument to the trial court opposing the defendant's *Anthony* claim. In that argument, the state

posited that the attempt to rob Calhoun's had been *completed* by the time, at least, when Ms. Lucas was taken to the fan room and beaten. Indeed, we were prompted to examine the attempt statute of the associated offense in our opinion because we recognized that, although especially aggravated robbery requires both the use of a deadly weapon and serious bodily injury to the victim, *see* Tenn. Code Ann. § 39-14-403(a) (2003), a mere attempt to commit this offense *need not* involve serious bodily injury, *see id*. § 39-12-101(a)(3) (attempt offense may be established by showing the offender took a substantial step toward committing the primary offense). Thus, we fully considered whether, once the defendant had performed a substantial step in robbing Calhoun's, the subsequent abuse of Ms. Lucas was superfluous to the conviction offense. We were brought up short again, however, by *Dixon*, wherein our supreme court looked to the intended primary offense and considered the offender's action taken while trying to "complete" the attempt. *See Dixon*, 957 S.W.2d at 535. In our view, *Dixon* commands us to view the defendant's attempt to rob Calhoun's as "in progress" until the efforts to open the safe were abandoned.

B. Whether the victims' movements and confinements prevented them from summoning help, lessened the defendant's risk or detection, or created a significant danger or increased the victims' risk of harm.

The final section of the state's petition disputes this court's treatment of the second prong of *Anthony*, which was dicta inasmuch as the due process issues were resolved on the basis of the first prong that the movements, confinements, or removals did not exceed what was necessary to commit the attempted especially aggravated robbery.

(1) Prevention of Summons for Help

The state's primary objection, as we understand it, is that the ability of Ms. Howell and Ms. Lucas to get to the office and summon the police is not outcome determinative pursuant to *Fuller*'s discussion of the second full prong of *Anthony*. We disagree.

In *Fuller*, the supreme court was addressing the state's argument that the lower court had "improperly converted the 'lessened the risk of detection' factor into an outcome-determinative test by focusing on whether the confinement actually prevented the defendants' detection." 172 S.W.3d at 537. The court was not discussing the separate inquiry under the second prong whether the additional movement or confinement prevented the victim from summoning help. The lower court had concluded that binding the victim did not prevent her from summoning help, and the state in *Fuller* apparently did not challenge that conclusion on appeal to the supreme court. *See id*.

(2) Risk of Detection

The state claims that the restraints on Ms. Howell and Ms. Lucas lessened the defendant's risk of detection by making it more difficult for the women to report the activities to the police. The court's opinion notes that Ms. Howell was abducted in the presence of other employees who were left unattended and free to leave the premises. Those employees posed the most direct and

serious risk that the defendant's activities would be detected. In considering this factor, we agree that under *Fuller* the detection factor does not turn upon whether the restraints actually prevented the defendant's detection and that under *Fuller* the defendant's intention regarding detection is the more pertinent inquiry. Even so, from the trial testimony, the defendant undoubtedly was aware that other employees were in the restaurant, and yet he left them unrestrained and unattended. Nothing that happened to Ms. Howell or Ms. Lucas actually lessened the risk of detection, and the record contains no evidence that the defendant regarded the unattended employees as posing no danger of detection.

(3) Danger or Risk of Harm

In dicta, the court voiced the opinion that Ms. Lucas' confinement in the fan room, while seriously injured in a dark room cluttered with equipment, created a significant danger and increased her risk of harm. The state maintains that the court also should have mentioned what happened in the office. We have discussed the office confinement at length and noted that the state and trial court had focused on the fan room. Further discussion is unnecessary.

Regarding Ms. Howell, the court did not perceive that the robbers increased her peril by leaving her prone with her hands temporarily restrained. The state maintains, as it did in connection with the first prong of *Anthony*, that Ms. Howell's injury established a significant danger and increased her risk of harm. The state appears to be making a *Dixon*-type argument, as it writes:

> By removing Ms. Howell from the first floor, where she was surrounded by coworkers, to the caged area in the back corner of the second-floor stockroom, the defendant clearly increased the danger to Ms. Howell by leaving her bleeding, prone, and bound in a location that her coworkers were unlikely to discover her.

The analogy to the facts in *Dixon* is not apt. The defendant in *Dixon* did not need to move the victim to commit aggravated assault or attempted sexual battery; those crimes could have been completed anywhere the victim was located. By contrast, the nature of the offense in this case was specifically tied to the locus of the safe in the office. Furthermore, Ms. Howell was abducted in the presence of other restaurant employees and taken to the second floor, which by no means was an expansive area. We are unable to conclude, as the state maintains, that Ms. Howell's coworkers were unlikely to discover her thereby increasing her risk of harm.

V. Conclusion.

We have carefully considered each of the points raised by the state in its petition to rehear. In the course thereof, we have endeavored to describe the legal parameters that attend the principles of due process announced in *Anthony* and its progeny, from all of which it is ORDERED that the state's petition for rehearing is respectfully DENIED.

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JAMES CURWOOD WITT, JR,. JUDGE

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JOSEPH M. TIPTON, JUDGE

(GARY R. WADE, P.J., not participating)